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U. S. EPA Region 4
Sam Nunn Atlanta Federal Center
Water Management Division
61 Forsyth Street
Atlanta, GA 30303
404-562-9346

FAX TRANSMISSION

DATE:

12/19/05

TO:

Rick Vail

FAX:

850-245-8858

TELEPHONE:

FROM:

John Mason

Water Mgt. Division

U. S. Environmental Protection Agency, Region 4

FAX:

404-562-9318

TELEPHONE:

404-562-

SUBJECT:

UST- SPH Comments

Number of Pages (including cover) 15

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Jeb Bush
Governor

Department of Environmental Protection

Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

David B. Struhs
Secretary

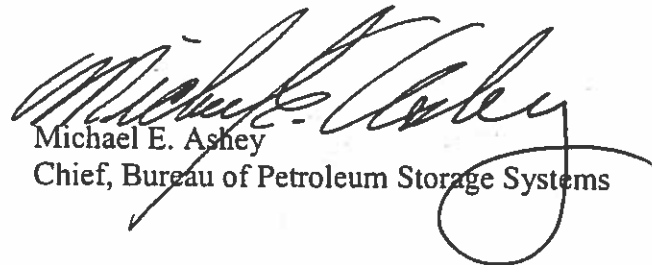
January 15, 2003

Mr. James D. Giattina, Director
Water Management Division
United States Environmental Protection
Agency
61 Forsyth Street
Atlanta, Georgia 30303-8960

Dear Mr. Giattina:

Thank you for your December 4th letter responding to Florida's State Program Approval (SPA) draft application. We have reviewed your comments and are not in agreement with some of EPA's conclusions. Also, while preparing the draft application, discussions with Region IV staff led us to believe that the Attorney General's Statement would be prepared after the draft was reviewed and comments made. We are preparing a more detailed response to your letter and will be contacting you in the near future about this issue. Please call me at 850-245-8821 if you have any questions.

Sincerely,



Michael E. Ashey
Chief, Bureau of Petroleum Storage Systems

CC: John Mason – USEPA region IV



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

**ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960**

DEC 01 2002

**Mr. John M. Ruddell, Director
Division of Waste Management
Florida Department of Environmental
Protection
2600 Blair Stone Road
Tallahassee, Florida 323996-2400**

Dear Mr. Ruddell:

Thank you for the submittal of your draft state program approval (SPA) application for the Florida Underground Storage Tank (UST) Program. The Underground Storage Tank (UST) Section and the Office of Water Legal Support Section have reviewed the draft application. Criteria for authorization is contained in 40 C.F.R. Part 281, Subpart C which requires, in general, that state requirements for new and existing UST systems must be no less stringent than the corresponding federal requirements. The purpose of our review was to determine if any statutory changes will be needed for final SPA approval.

The draft application did not include an Attorney General Statement. Consequently, we were not able to reach absolute conclusions in regard to the adequacy of the State's statutes for the purposes of state program approval. However, we have identified a number of statutory issues which may be problematic and will require an analysis by the Attorney General.

If you would like to discuss this matter, do not hesitate to call me or John Mason at (404) 562-9441. We will be happy to meet with you to discuss our comments and any concerns you may have regarding SPA approval.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Giattina".

**James D. Giattina, Director
Water Management Division**

Enclosure

**cc: Michael E. Ashey, FDEP
Susan Capel**

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Concurrence: _____ Isbell *[Signature]* Capel *[Signature]* Mason _____ Howell _____
11-6-02 6/22/02

**COMMENTS ON DRAFT SPA APPLICATION
FOR FLORIDA, DATED SEPTEMBER 6, 2001**

- 1. Requirement:** 40 C.F.R. § 281.30. New UST system design, construction, installation, and notification. The state must have requirements that ensure all new underground storage tanks, and the attached piping in contact with the ground and used to convey the regulated substance stored in the tank conform to the following:
- a) Be designed, constructed, and installed in a manner that will prevent releases for their operating life due to manufacturing defects, structural failure, or corrosion.
 - b) Be provided with equipment to prevent spills and tank overfills when new tanks are installed or existing tanks are upgraded unless the tank does not receive more than 25 gallons at one time.
 - c) All UST system owners and operators must notify the implementing state agency of the existence of any new UST system using a form designed by the state agency.

State Authority Cited: Ch. 376.303, F.S., Ch. 489.113, F.S., Ch. 489.115, F.S., and Ch. 376.3077, F.S.

Analysis:

- A. Ch. 489.113, F.S., and Ch. 489.115, F.S., deal with contractor qualification and certification. Ch. 376.3077, F.S., is a prohibition against placing motor fuel into an unregistered tank.

Ch. 376.303(1)(a), F.S., provides general rulemaking authority for FDEP and is the authority cited throughout the authorization package as the basis for rulemaking. Pertinent sections are cited below:

“Establish rules, including, but not limited to, construction standards, permitting or registration of tanks, maintenance and installation standards, and removal or disposal standards, to implement the intent of ss 376.30-376.319 and to regulate underground and aboveground facilities and their onsite integral piping systems. Such rules may establish standards for underground facilities which store hazardous substances or pollutants, and marine fueling facilities and aboveground facilities, not covered by chapter 377, which store pollutants.”

Ch. 376.303(1)(a), F.S.

Applicable terms are defined below:

“Facility” is defined under Ch. 376.301(18), F.S., to mean a nonresidential location containing or which contained any underground stationary storage tank or tanks which contain hazardous substances or pollutants and have individual storage capacities greater than 110 gallons. (The exemptions included in this definition are not pertinent to the discussion here but will be discussed later in this document.)

“Hazardous substances” is defined under Ch. 376.301(2), F.S., by referencing the definition under CERCLA.

“Pollutants” is defined under Ch. 376.301(34), F.S., to include any “product” as defined in Ch. 377.19(11), F.S., pesticides, ammonia, chlorine, and derivatives thereof, excluding liquefied petroleum gas.

“Product” is defined by Ch. 377.19(11), F.S., to mean any commodity made from oil or gas and includes refined crude oil, fuel oil, gasoline, blends of liquid products or byproducts derived from oil or gas, and other enumerated derivatives of oil or gas.

Florida uses the term “pollutant” to define petroleum and its derivatives, although this term also includes substances which are not part of the federal definition of petroleum. Florida uses the term “facility” to define an underground storage tank system. Thus, Florida’s rulemaking authority for UST systems reaches to tanks storing petroleum or hazardous substances.

Although Ch. 376.303(1)(a) outlines specific rulemaking duties, a great deal of its authority appears to derive from the intent of the chapter. Legislative intent behind promulgation of ss 376.30-376.319 is explicitly stated under Ch. 376.30(5), F.S., as follows: “to support and complement applicable provisions of the Federal Water Pollution Control Act, as amended, specifically those portions relating to the national contingency plan for removal of pollutants.”

The Federal Water Pollution Control Act deals exclusively with discharges to surface waters, not groundwater or soils. It is unclear how Florida’s generalized rulemaking authority, even where supplemented by other state authorities, supports a rulemaking requirement for UST design and construction when the legislative intent behind Ch. 376.303, F.S., concerns surface water discharges, not discharges to soil and groundwater. Please explain how the cited statutes provide sufficient rulemaking authority for design and construction of USTs.

- B.** Ch. 376.30(3) appears to contain another, but less explicit, legislative intent. Here, FDEP is empowered to “[d]eal with the environmental and health hazards and threats of danger and damage posed by such storage, transportation, disposal, and related activities” and to “[r]equire the prompt containment and removal of products occasioned thereby” of pollutants, dry cleaning solvents, and hazardous substances. FDEP is also directed to establish a funding program to restore water supplies contaminated by pollutants and hazardous substances.

This section appears to focus on establishing a state funded program to remediate discharges of pollutants and hazardous substances. It does not appear to authorize rulemaking related to construction and design of USTs. Please specify the subsections of Ch. 376.303, F.S., relied upon to establish the required rulemaking authority and explain how the required authority is derived. Clearly identify multiple subsections that operate together to provide the authority and explain what authority is provided by each subsection.

- 2. Requirement:** 40 C.F.R. § 281.31. Upgrading existing UST systems. The state must have requirements that ensure existing UST systems will be replaced or upgraded before December 22, 1998.

State Authority Cited: Ch. 376.303, F.S.

Analysis: Again, generalized rulemaking authority is cited but the legislative intent behind that authority, which relates to regulation of surface discharges, does not appear to authorize development of standards and requirements for upgrade of existing USTs. Please explain how the cited authority operates to authorize the required rulemaking. Explain what authority is provided by each subsection cited.

- 3. Requirements:** 40 C.F.R. § 281.32. General operating requirements. The state must have requirements for new and existing USTs to prevent spills and overfills; to ensure cathodic protection systems are operated by trained personnel in a manner that ensures no releases occur; to ensure that tanks are made or lined with materials compatible with the substance stored; to ensure that tanks are structurally sound and upgraded or repaired in a manner to prevent releases due to structural failure or corrosion; and to ensure that the facility maintains records of monitoring, testing, closure, repair, and upgrading.

State Authority Cited: Ch. 376.303, F.S.

Analysis: Again, generalized rulemaking authority is cited but the legislative intent behind that authority, which relates to regulation of surface discharges, does not appear to authorize development of rules related to operating requirements for tanks. Please explain how the cited authority operates to authorize the required rulemaking. Identify

specific subsections providing the required authority and explain what authority is provided by each subsection cited.

4. **Requirements:** 40 C.F.R. §§281.33-34 and §281.35(a)-(e). Release Detection; Release Reporting, Investigation, and Confirmation; and Release Response and Corrective Action. The state must have requirements to address suspected releases, reporting, and cleanup requirements for owners/operators.

State Authority Cited: Ch. 376.303, F.S., Ch. 376.3071, F.S., Ch. 403.061(6), (8), (9), (10), F.S., Ch. 403.62, F.S.

Analysis: The general rulemaking authority under Ch. 376.303, F.S., is cited as well as the rulemaking authority given under Ch. 403.061(6), (8), (9), (10), F.S., and the broad statutory statement under Ch. 403.62, F.S., providing DEP general control and supervision of pollution to underground waters. Ch. 376.3071, F.S., which creates the Inland Protection Fund, is also cited.

Among other powers, Ch. 403.061, F.S., gives DEP authority to issue orders, exercise general supervision of the administration and enforcement of the laws, rules, and regulations pertaining to air and water, and to control and prohibit pollution of water. Legislative intent for Ch. 403 is specified under Ch. 403.021, F.S. Here, the Legislature declares that it is in the state's interest to protect waters of the state and domestic water supplies, among other interests. "Waters" is defined under Ch. 403.031 to include groundwater as well as surface water. But nowhere does the statute address underground storage tanks or their regulation. The definition of "facility" in this chapter references the definition contained in Ch. 376.301 and, therefore, includes underground storage tanks. But the term "facility" under Ch. 403.021, F.S., is only used to classify a "facility" separately from real and personal property of a manufacturing or processing plant or installation. The term "facility" does not appear anywhere else in this section or in the context of regulating releases from underground storage tanks used to distribute petroleum. It appears that use of the term "facility" under Ch. 403.021 may serve as a limitation on UST releases for which the state has jurisdiction. Please clarify.

Ch. 376.3071, F.S., creates a trust fund administered by the State for remediation of petroleum contamination resulting from underground storage tank systems. Rulemaking authority under this section is limited to that necessary for the State to administer the fund. It does not appear to authorize rulemaking to address the component parts of the remediation process. As stated before, it is unclear how Ch. 376.303, F.S., provides authority to regulate USTs and releases from USTs to soils and groundwater when the stated legislative intent appears to focus on surface waters. It is also unclear how Ch. 403, F.S., provides rulemaking authority for USTs when it contains no mention of USTs using the term itself or any of the alternative terms discussed above, and only an oblique

reference to underground waters. It is also unclear how these citations would work together to provide the necessary authority.

Please explain how the cited statutes provide authority to regulate petroleum UST releases to soils and groundwater from USTs.

5. **Requirements:** 40 C.F.R. §281.35(f). Release response and corrective action. This section calls for rulemaking authority whereby the State must notify affected persons of all confirmed UST releases calling for a plan for corrective action.

State Authority Cited: Ch. 376.303, F.S., Ch. 120.53(2) and (6), F.S.

Analysis: The general rulemaking authority of Ch. 376.303, F.S., is cited, as well as Ch. 120.53(2) and (6), F.S. (Ch. 120.53(6) cannot be found on the 2001 internet version of the statutes.) Ch. 120, F.S., is the State's Administrative Procedure Act. Ch. 120.53, F.S., requires that agencies maintain all final orders along with an index system for easy reference. Ch. 120.53(2), F.S., allows the agency to substitute an official reporter to publish and index agency orders, rather than requiring the agency to maintain and index the orders itself. While Ch. 120.53(2), F.S., requires the agency to make certain information available to the public, it does not impose an affirmative duty on the agency to notify persons affected by its actions. It is unclear how the authorities specified in Ch. 376.303, F.S., and Ch. 120.53(2), F.S., impose an affirmative public notification requirement on FDEP to notify persons affected by UST releases requiring a corrective action plan, as required by 40 C.F.R. §281.35(f). Please explain.

6. **Requirement:** 40 C.F.R. § 281.36. Out-of-service UST systems and closure. The state must have requirements ensuring that USTs which close temporarily continue to conform with all existing requirements for active UST systems. Permanently closed UST systems must decontaminate equipment, notify the state of the closure, and perform corrective action if needed.

State Authority Cited: Ch. 376.303, F.S.

Analysis: Again, generalized rulemaking authority is cited but the legislative intent behind that authority, which relates to regulation of surface discharges, does not appear to authorize development of rules related to operating requirements for temporarily closed tanks or procedures for permanently removing tanks from service. Please specify the individual subsections within Ch. 376.303, F.S., which provide the required authority. Explain what authority is provided by each subsection cited and how they operate together to authorize the required rulemaking.

7. **Requirements:** 40 C.F.R. § 281.37(a) - (b) and (d). Financial responsibility for UST systems containing petroleum. The state must have requirements to ensure that

owner/operators have financial assurances for each petroleum UST system, including third party compensation. A phased-in schedule for obtaining financial assurance is allowed. Owner/operators must maintain records demonstrating compliance with the financial assurance requirements.

State Authority Cited: Ch. 376.309, F.S., which imposes financial responsibility requirements of each owner of a facility (emphasis added), and Ch. 376.303, F.S., the general rulemaking authority.

Analysis: Ch. 376.309 limits the financial responsibility requirement to the owner, whereas the Federal financial guarantee requirement extends to both the owner and operator in that one or the other must obtain the financial guarantees. Further, Ch. 376.309, F.S., does not require third party liability insurance for compensating third parties for bodily injury and property damage caused by sudden and nonsudden releases. Rather, the financial guarantee amount appears limited to corrective action costs only.

Please explain how the State derives the authority to impose the financial guarantee requirement against the operator of the UST. Please explain where the State derives the authority to require liability insurance for third party damages. Please explain how the cited statutes provide sufficient authority to require the amount of coverage per tank required by the Federal statute.

8. **Requirements:** 40 C.F.R. 281.37(c). Financial responsibility for UST systems containing petroleum. States may allow the use a variety of mechanisms to meet the financial guarantee so long as each mechanism is valid and enforceable; is issued by a provider that is qualified or licensed in the state; does not permit cancellation without allowing the state to draw funds; ensures that funds will only and directly be used for corrective action and third party liability costs; and requires that the provider notify the owner or operator of any circumstances that would impair or suspend coverage.

State Authority Cited: Ch. 376.303, F.S., the general rulemaking authority; Ch. 376.309, F.S., the general requirement for financial responsibility applicable to owners; and Ch. 376.3072, F.S., which is entitled the Florida Petroleum Liability and Restoration Insurance Fund (Petroleum Restoration Fund).

Analysis: Ch. 376.309, F.S., applies only to owners and appears to limit the financial guarantee obligation to corrective action costs only, omitting the third party liability requirement for compensating third parties for bodily injury and property damage caused by sudden and nonsudden releases. Although Ch. 376.072, F.S., applies to both owners and operators, it is unclear whether it imposes a requirement for third party liability coverage since it mentions this term only in the context of determining eligibility for the petroleum restoration fund. Additionally, Ch. 376.309, F.S., applies to "facilities" whereas Ch. 376.072, F.S., applies only to "petroleum storage systems." Although the

definition of underground storage facilities appears to include “petroleum storage systems,” rulemaking authority associated with each term is different. For example, “petroleum storage system” is not used in the statutory section imposing a financial guarantee requirement even though the petroleum restoration fund is intended to partially satisfy that requirement. Additionally, the requirement for third party liability insurance for compensating third parties is required for “petroleum storage systems” but not for “facilities.”

Are the requirements and rulemaking authorities different for “petroleum storage systems” than they are for “facilities?” Please clarify the apparent inconsistencies. Please explain how the cited authorities operate to authorize the required rulemaking.

9. **Requirement:** 40 C.F.R. § 281.39. Lender Liability. A state program that has a security interest exception will be considered no less stringent than the federal program provided the state program: 1) mirrors the security interest exemption under 40 C.F.R. Part 280, Subpart I; 2) achieves same effect as provided by the criteria contained in 40 C.F.R. § 281.39(2)(i) which relates the exemption to the amount of daily control of the UST system held by the owner or operator.

State Authority Cited: None.

Analysis: Without a statutory cite, it is impossible to determine whether the State has a security interest exemption equivalent to the Federal exemption. Please provide statutory cites and rulemaking cites that demonstrate equivalence to the federal exemption.

10. **Requirement:** 40 C.F.R. § 281.40: Requirements for compliance monitoring program, and authority.

State Authority Cited: Ch. 376.303(1)(a) and (g), F.S.; Ch. 376.303(3)(a), F.S.; Ch. 403.09(1)-(3). Ch. 376.303(a)(1) is the general rulemaking authority; Ch. 376.303(1)(g) refers to “terminal facilities.”

Analysis: As an initial matter, Ch. 376.303(1)(g) refers to “terminal facilities” which are defined as devices, structures, or equipment used to pump pollutants over, under, or across water bodies including appurtenant estuaries, tidal flats, beaches, or water front lands. It is unclear how this term is relevant to USTs or the rulemaking requirements of 40 C.F.R. § 281.40.

With respect to compliance authorities, Florida’s compliance authorities, operating alone, would satisfy the requirements specified under 40 C.F.R. § 281.40. However, Florida’s liability exemptions undermine that authority and are in direct conflict with federal law. The liability exemptions are set out below.

- a) The Inland Protection Trust Fund, the State-funded cleanup program under Ch. 376.3071, provides a liability exemption for persons who report a historical discharge within certain prescribed time periods. Persons reporting a discharge under the program on or before December 31, 1988 are immune from civil or criminal liability under Ch. 376.3071(9)(c), F.S. Ch. 376.3071(13)(d), F.S., reopened the window for immunity. Persons reporting a discharge on or before January 1, 1995, are exempt from civil and criminal liability. Even though both of these programs are now closed to discharge reporting, persons who reported during the grace periods remain exempt from liability even if site rehabilitation remains incomplete. Florida's liability exemption is in direct conflict with federal law under Subtitle I of RCRA. Under federal law, the duty to conduct corrective action continues until corrective action is complete.
- b) Florida provides a liability exemption for UST owners patterned on the CERCLA innocent landowner defense. Ch. 376.308(1)(c), F.S., provides a liability exemption based on the whether the owner knew or should have known about the contamination. Under Ch. 376.308(1)(c), F.S., an owner is exempt from liability for the discharge of petroleum or petroleum products if the owner can establish the property was contaminated at the time of purchase, that the owner did not know of the polluting condition at the time of purchase, and, if purchased subsequent to July 1, 1992, that the owner conducted a diligent inquiry consistent with good commercial practices to minimize liability.

No such immunity is available under the federal statutory scheme. The federal definition of "owner" does not condition liability on knowledge or inquiry into contamination at the time of purchase.

- c) Florida provides an exemption under Ch. 376.308(5), F.S., based on eligibility to participate in the Inland Protection Trust Fund, the state cleanup fund for releases from USTs. Eligible owner/operators are immune from administrative or judicial action brought by or on behalf of the State or any other person to compel rehabilitation in advance of commitment of funding in accordance with the site's priority ranking. Eligible owner/operators are immune from civil actions brought by any person for costs of restoration or to compel restoration in advance of the state's commitment of restoration funding per the site priority ranking.

No such immunity exists under the federal statutory scheme. Cleanup costs may be provided from the federal trust fund but this provision does not translate into an immunity from liability. On the contrary, the Administrator is statutorily obligated to seek recovery of funds expended.

As stated earlier, it appears that the statutory sections cited above provide liability exemptions for certain classes of UST owner/operators that are not available under the federal statutory scheme and appear to directly conflict with federal law. Since the criteria for authorization is that the state program be no less stringent than the federal program, please explain how these liability exemptions do not render FDEP's program less stringent than the federal program.

- 11. Requirement:** 40 C.F.R. § 281.41. Requirements for enforcement authority. This requires the ability to issue injunctions at the administrative and the civil level and to assess appropriate penalties. Burdens of proof and the degree of knowledge and intent must be no greater than that required by the federal scheme.

State Authority Cited: Ch. 376.302(1)(b) & (c), Ch. 376.302(2) & (4), Ch. 376.303(3)(c), Ch. 403.121(1)&(2), Ch. 403.131, Ch. 403.141(1), Ch. 403.161(1)(c), and Ch. 403.161(5).

Analysis: With the exception of the liability exemptions discussed above, Florida's compliance authorities satisfy the requirements specified under 40 C.F.R. § 281.41. However, the liability exemptions appear to render Florida's program less stringent and in direct conflict with federal law. Further, the exemptions impede EPA's oversight ability.

- 12. Requirement:** 40 C.F.R. § 281.42. Requirements for public participation. A state program must allow for intervention by right; and opportunity to comment on proposed settlements of civil enforcement, authority to investigate citizen complaints about violations, and permissive intervention.

State Authority Cited: Ch. 376.313, Ch. 403.061, Ch. 403.121, Ch. 403.412, Ch. 120.569, Ch. 120.57, F.S., and 1.230 Florida Rules of Civil Procedure.

Analysis: The authorities cited satisfy the requirements of 40 C.F.R. § 281.42.

- 13. Requirement:** 40 C.F.R. § 281.43. Sharing of information with EPA.

State Authority Cited: None.

- 14. Other Issues:**

A. Inconsistent Definitions. "Petroleum" is defined under RCRA Section 9001(8). The Florida statutes use several terms in context with underground storage tanks to describe substances meeting the federal definition of petroleum. These terms include "pollutant," "petroleum," and "petroleum product." The definition of these terms do not agree with one another or the federal definition of "petroleum." As a result of this inconsistency, it is

unclear whether Florida's authority to regulate petroleum underground storage tanks reaches as far as the federal statutory authority.

B. General Rulemaking Authority. Chapter 376.303, F.S., sets out powers and duties of the Florida Department of Environmental Protection related to pollution of surface and groundwaters. Ch. 376.303(1)(a), F.S., authorizes rulemaking for underground storage "facilities" and their onsite integral piping managing "hazardous substances" or "pollutants." This is the general rulemaking authority cited throughout the draft authorization package.

Ch. 376.303(1)(a), F.S., provides rulemaking authority for underground "facilities," including appurtenant piping, managing hazardous substances or pollutants. The term "pollutants" includes petroleum by incorporation of the definition of "product." Certain classes of rulemaking are specifically authorized by Ch. 376.303(1)(a), F.S., but a generalized authority is provided by the phrase "to implement the intent of ss. 376.30-376.319." Sections 376.30 through 376.319, F.S., create the statutory platform which provides DEP the authority to regulate underground storage tanks.

Legislative intent for ss. 376.30-376.319 is found at Ch. 376.30(5), F.S. which states that these sections are intended to "support and complement applicable provisions of the Federal Water Pollution Control Act, as amended, specifically those provisions relating to the national contingency plan for removal of pollutants." The Federal Water Pollution Control Act (FWPCA) is directed towards surface water discharges, not releases to soils and groundwater. Further, the meaning of "pollutants" as used in its statement of legislative intent is unclear. At least three possibilities are available: 1) the State's own definition of pollutant, which is limited to petroleum and its derivatives; 2) the definition of pollutant as contained under Section 502(6) of the FWPCA which includes solid waste, sewage, garbage, dredged spoil, incinerator residue, radioactive materials, and heat, among other enumerated wastes, but does not explicitly include petroleum; or 3) the definition of pollutant contained under Section 101(33) of CERCLA and 40 C.F.R. Section 300.5, both of which explicitly exclude petroleum and its derivatives from the definition. Thus, the State's rulemaking authority stands or falls on the class of substances the Legislature intended to name in using the term "pollutant" in its statement of intent.

C. Inconsistent Rulemaking Authority. As a further complication, the statutes contain alternate terms and definitions for underground storage tank systems and petroleum, as those terms are defined by the federal statutes.

Florida defines a "petroleum storage system" as a stationary tank not covered under the provisions of Ch. 377, F.S., together with any onsite integral piping or dispensing system associated therewith, which is used, or intended to be used, for the storage or supply of any "petroleum product," as defined under Ch. 376.301(31), F.S. Ch. 377, F.S., applies

to oil and gas production facilities and is not pertinent here. Thus, a "petroleum storage system" under Ch. 376.301(33), F.S., is a class of storage systems which includes the federally-defined underground storage tanks, among other types of storage systems.

Recall, generalized rulemaking authority to regulate underground "facilities" and their integral piping systems is provided under Ch. 376.303(1)(a), F.S., through its use of the phrase "to implement the intent of ss. 376.30-376.319." However, this generalized authority does not address "petroleum storage systems" or "petroleum product." In fact, these terms are not used anywhere in the rulemaking section of Ch. 376.303(1)(a), F.S. These terms are only used in certain subsections of ss. 376.30 - 376.319, F.S., authorizing creation of a trust fund to meet the financial guarantee requirements and provide for cleanup. For reasons unknown, the term "petroleum storage systems" is not used in the statutory section imposing a financial guarantee requirement even though the trust fund is intended to partially satisfy that requirement.

Florida defines "petroleum product" to mean any liquid fuel commodity made from petroleum, including but not limited to, all forms of fuel known or sold as diesel fuel, kerosene, all forms of fuel known or sold as gasoline, and fuels containing mixtures of gasoline and other products. The definition "petroleum product" excludes the following petroleum derivatives: liquefied petroleum gas, ASTM Grades No. 5 and No. 6 residual oils, bunker C residual oils, certain intermediate fuels, asphalt oils and petroleum feed stocks. These excluded fuels are included in the Federal definition of "petroleum."

Florida uses the terms underground "facility" and "petroleum storage system" to describe an underground storage tank system, however, Florida's definition of underground "facility" differs from that of "petroleum storage system" and both of these definitions differ from the federal definition of "underground storage tank system." Florida uses the term "pollutant," "petroleum product," and "petroleum" to describe substances which would fall under the federal definition of "petroleum" but again, the individual definitions differ from each other and differ from the federal definition of "petroleum".

In conclusion, Florida cites Ch. 376.303(1)(a), F.S., as the general rulemaking authority for underground "facilities," but this section does not provide rulemaking authority for "petroleum storage systems." Financial guarantees are required for "facilities" but not for "petroleum storage systems." The state fund is available as a financial guarantee for "petroleum storage systems" but not for "facilities." Underground "facilities" manage "pollutants" which include petroleum and certain derivatives of petroleum. "Petroleum storage systems" manage "petroleum products" which includes petroleum and some petroleum derivatives but excludes certain petroleum derivatives that are included in the federal definition of "petroleum."

Because of the discrepancies in Florida's use and meaning of the terms "facility," "petroleum storage system," "pollutant," "petroleum storage system," and "petroleum

product” in its authorizing statutes, it is unclear whether Florida has the ability to undertake a rulemaking equivalent to the federal rules or whether the resulting program would be no less stringent than the federal program.

D. Conflicting Statutory Exemptions. “Facility” is one term Florida uses to describe an “underground storage tank system”, as that term is defined at RCRA Section 9001(8). Rulemaking authority is provided for underground “facilities” under Ch. 376.303(1)(a), F.S. However, Florida’s definition of “facility” excludes certain underground storage tanks that are otherwise regulated under the federal underground storage tank statute. Florida excludes the following federally regulated tanks:

1) Residential Tanks. Statutory rulemaking authority is provided for underground “facilities.” Florida’s statutory definition of “facility” includes “nonresidential” underground storage tanks having a storage capacity greater than 110 gallons. The definition of “facility” does not include “residential” tanks, thus, DEP apparently has no authority to regulate residential tanks of any capacity.

RCRA Section 9001(1)(A) excludes from Subtitle I regulation residential tanks of 1,100 gallons or less used for storing motor fuel for noncommercial purposes. RCRA Section 9001(1)(B) excludes tanks used for storing heating oil on the premises where served. However, Florida’s statute provides a blanket exemption for all residential tanks since rulemaking authority is only available for “nonresidential” tanks. At least 12 residential USTs greater than 1,100 gallons operate in the State. These tanks are regulated under the federal statute but exempt under the State statute.

2) Agricultural Tanks. Rulemaking authority is provided for underground “facilities.” Florida’s definition of “facility” excludes agricultural tanks having a storage capacity of less than 550 gallons. RCRA Section 9001(1)(A) exempts farm tanks of 1,100 gallons or less storing motor fuel for consumptive purposes from regulation under Subtitle I. RCRA 9001(1) also exempts any tank used for storing heating oil on the premises where served under subsection (B) of this section.

Florida regulates all agriculture tanks of 550 gallons or more, without consideration of substance stored or how it is used. Thus, Florida’s statutory authority to regulate agricultural tanks is broader in scope than the federal authority, but only with respect to capacity. Depending upon the substance stored and how it is used, Florida’s agricultural tank exemption may be less stringent than the federal tank exemptions. For example, an agricultural tank with a capacity of 550 gallons or less storing anything other than motor fuel for noncommercial purposes or heating oil for consumptive use on the premises is regulated under the federal statutes whereas it is exempt under the Florida statute.